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April 26, 2005

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**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON**

In re:

BRIAN WHEELER and MICHELLE
WHEELER,

Debtors.

No. 04-52032

MEMORANDUM DECISION
PUBLISHED

This case came before the Court on March 1, 2005, on the Chapter 13 Trustee's (Trustee) objection to confirmation/alternative motion to dismiss. Brian and Michelle Wheeler (Debtors) filed an opposition to the objection/alternative motion. Based on the arguments presented and pleadings submitted, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtors filed bankruptcy under Chapter 13, Title 11 on December 31, 2004. On that same day, they filed a Chapter 13 Plan of Reorganization. The first meeting of creditors pursuant to 11 U.S.C. § 341 (First Meeting) was held on February 10, 2005. On February 18, 2005, the Trustee filed Trustee's Objection to Confirmation/Alternative Motion to Dismiss, setting a hearing date of March 1, 2005 (11 days notice as to the alternative motion). In the objection portion of the pleading, the Trustee requested that the Debtors

MEMORANDUM DECISION - 1

1 each provide a copy of two recent, consecutive pay stubs. In the motion portion of the
2 pleading, the Trustee gave the Debtors a deadline of March 31, 2005, to provide the
3 requested information, and included the following directive: "In the event debtor fails to
4 comply with the foregoing order and timelines, the Trustee's Motion to Dismiss the debtor's
5 Chapter 13 case should be granted upon submission of a declaration filed in connection
6 with an order of dismissal, without further notice."

7 On February 23, 2005, the Debtors filed a response to Trustee's objection and
8 alternative motion, asserting that the Trustee's motion to dismiss did not comply with the
9 requirements of due process on several grounds, including insufficient notice, improper
10 service, and failure to provide an opportunity for hearing. The Debtors also asserted that
11 the motion failed to state adequate grounds for dismissal, was not timely, and did not
12 provide adequate opportunity for the Debtors to remedy deficiencies.

13 On February 25, 2005, the Trustee filed a Memorandum in Support of Trustee's
14 Objection to Confirmation. The memorandum provides that the information requested by
15 the Trustee—a copy of two recent, consecutive pay stubs for each debtor—is required by
16 Local Rules W.D. Wash. Bankr. R. 3015-1(f). The memorandum further sets forth the
17 history of the different methods used by the Trustee to obtain information requested of
18 debtors upon the Trustee's objection to confirmation:

19 In the first, confirmation was denied and a deadline was set for providing
20 documents without consequence for non-compliance. With great regularity,
21 deadlines were ignored and the Trustee was required to file a separate
22 motion to dismiss for lack of a confirmable plan and unreasonable delay that
23 is prejudicial to creditors. Debtors then regularly complied under the threat
24 of the dismissal motion, or a stipulated order resolving such motion. . . .

25 In the second approach . . . confirmation was denied and a deadline
26 was set for providing documents. These orders included an "alternative
27 motion to dismiss," but required the trustee to provide 7 days notice to
counsel for failure to comply if the deadline for document submission was
missed. In two out of three cases with such provisions, the Trustee had to
send out the Notice of default. With a default rate of sixty-seven percent, it
became obvious that the Trustee was functioning as the tickle system for
debtors' counsel. This placed an unreasonable and unnecessary burden on
the Trustee's office. This approach also resulted in unnecessary delay while
the Notice of Default served to prompt debtors and their counsel to comply
with the terms of the Court's order. . . .

28 MEMORANDUM DECISION - 2

In the third approach, as used in this case, confirmation is denied and a deadline is set with dismissal without further notice as the consequence for non-compliance. . . . This approach appropriately requires counsel to take action without further prompting from the Trustee. . . . Where unforeseen problems arise, counsel can always request additional time to comply.

4 The Trustee's Objection to Confirmation/Alternative Motion to Dismiss came for
5 hearing on March 1, 2005, at which time the Court took the matter under advisement.
6 Although not requested by the Court, both parties subsequently filed additional pleadings
7 on the pending issues. On March 7, 2005, Daniel Radin, an Assistant Attorney General
8 representing the State of Washington's Bankruptcy & Collections Unit, filed a letter advising
9 the Court that the State also utilizes a practice similar to that of the Trustee's when
10 objecting to confirmation. This Court is aware that other governmental agencies, such as
11 the Internal Revenue Service and the Office of the United States Trustee, also utilize similar
12 practices. On March 18, 2005, Debtors' counsel filed a letter to the Court in response to
13 Mr. Radin's letter.

CONCLUSIONS OF LAW AND DISCUSSION

15 The primary issue before the Court is whether the Court can sua sponte dismiss a
16 Chapter 13 case under 11 U.S.C. §105(a), rather than by motion with notice and a hearing
17 under 11 U.S.C. § 1307. The Debtors contend that any procedure utilized for dismissal
18 other than that set forth in and required by 11 U.S.C. § 1307 and applicable court rules,
19 denies them their right to due process.

20 The Debtors first argue that the Trustee, by seeking to dismiss their case through
21 an alternative motion to dismiss, must comply with the notice and hearing requirements set
22 forth by the Bankruptcy Code (Code) and the applicable rules. 11 U.S.C. § 1307(c)
23 provides, in relevant part, that “on request of a party in interest or the United States trustee
24 and after notice and a hearing, the court may convert a case under this chapter to a case
25 under chapter 7 of this title, or may dismiss a case under this chapter” Fed. R. Bankr.
26 P. 9014(a) provides that in contested matters, “relief shall be requested by motion, and
27 reasonable notice and opportunity for hearing shall be afforded the party against whom

MEMORANDUM DECISION - 3

1 relief is sought." Local Rules W.D. Wash. Bankr. R. 9013-1(d)(2)(F) requires at least
2 15 days notice preceding the date fixed for hearing. Local Rules W.D. Wash. Bankr.
3 R. 9013-1(c)(2) requires that notice be given to the debtor, the debtor's attorney, the
4 trustee, the United States trustee, all creditors, all indenture trustees, and any persons
5 requesting special notice.¹ The Debtors argue that because the Trustee's alternative
6 motion to dismiss does not comply with the Code and these rules, the Debtors were
7 deprived their right to due process.

8 The Trustee counters that although it has labeled its request for relief an alternative
9 motion to dismiss, it is not seeking to dismiss the Debtors' case pursuant to 11 U.S.C.
10 § 1307. Rather, the Trustee is attempting to put into place a "strict compliance" order
11 whereby the Court sua sponte dismisses a debtor's case when certain information
12 necessary for confirmation is not provided by a specific date. The Trustee argues that such
13 a strict compliance order is within the scope of 11 U.S.C. § 105(a), as recognized in the
14 recent decision of In re Tenant, 318 B.R. 860 (9th Cir. BAP 2004), and the 1986
15 amendment to this Code section.

16 11 U.S.C. § 105(a) provides as follows:

17 The court may issue any order, process, or judgment that is necessary or
18 appropriate to carry out the provisions of this title. No provision of this title
19 providing for the raising of an issue by a party in interest shall be construed
20 to preclude the court from, sua sponte, taking any action or making any
determination necessary or appropriate to enforce or implement court orders
or rules, or to prevent an abuse of process.

21 Although most bankruptcy courts once held that a court could not dismiss a case
22 sua sponte under 11 U.S.C. § 1307, 11 U.S.C. § 105(a) "was revised in 1986 to overrule
23 prior decisions prohibiting a court from acting sua sponte when the statute authorized only
24 a party in interest to act." Tenant, 318 B.R. at 869; see also 8 L. King, Collier on
25 Bankruptcy, ¶ 1307.04, p.1307-9-10 (15th ed. rev. 2004).

26 ¹The Court makes no ruling on whether Local Rules W.D. Wash. Bankr.
27 R. 9013-1(c)(2) applies to a motion to dismiss under 11 U.S.C. § 1307, as asserted by the
Debtors.

28 MEMORANDUM DECISION - 4

1 In Tennant, the debtor filed his Chapter 13 petition, but failed to file his Schedules
2 I and J, the Chapter 13 plan, or the Statement of Financial Affairs along with the petition.
3 Tennant, 318 B.R. at 864. On the same day that the debtor filed his petition, the clerk of
4 the court entered an “Order to Comply with Bankruptcy Rules 1007 and 3015(b) and Notice
5 of Intent to Dismiss Case under 11 U.S.C. § 109(g)(1),” (Comply Order) that directed the
6 debtor to file the missing documents within 15 days or to move for an extension of time.
7 Tennant, 318 B.R. at 864 (footnote omitted). The Comply Order stated that if the debtor
8 did not comply by the deadline, the court would dismiss the case without further notice.
9 Tennant, 318 B.R. at 864. The debtor failed to file the Statement of Financial Affairs within
10 the requisite period of time. The clerk of the court subsequently issued an order dismissing
11 the debtor’s case without further notice or a hearing. Tennant, 318 B.R. at 865. There is
12 no indication that the bankruptcy judge prepared or even considered the Comply Order or
13 dismissal order, which was a generated form that bore the name of the clerk of court,
14 followed by “For The Court.” Tennant, 318 B.R. at 865.

15 On appeal, the Ninth Circuit Bankruptcy Appellate Panel initially held that a “court
16 can dismiss a case sua sponte under Section 105(a).” Tennant, 318 B.R. at 869 (citing
17 In re Meints, 222 B.R. 870, 871-72 (Bankr. D. Neb. 1998)). The appellate court then
18 affirmed the bankruptcy court’s sua sponte dismissal, noting that the bankruptcy court
19 based its dismissal on the debtor’s failure to file the Statement of Financial Affairs within
20 the directed 15 days and as required by Fed. R. Bankr. P. 1007(c). “To enforce the
21 Comply Order and Rule 1007(c), the court was authorized to dismiss Debtor’s case
22 sua sponte. Section 105(a) makes ‘crystal clear’ the court’s power to act sua sponte where
23 no party in interest or the United States trustee has filed a motion to dismiss a bankruptcy
24 case.” Tennant, 318 B.R. at 869 (quoting In re Greene, 127 B.R. 805, 807 (Bankr. N.D.
25 Ohio 1991)).

26 In considering the bankruptcy court’s sua sponte power under 11 U.S.C. § 105(a),
27 the Ninth Circuit Bankruptcy Appellate Panel also addressed whether this power is
28

MEMORANDUM DECISION - 5

1 restricted by Fed. R. Bankr. P. 1017(c). Tennant, 318 B.R. at 870. This rule provides that
2 the court may dismiss a Chapter 13 case under 11 U.S.C. § 1307(c)(9) “after a hearing on
3 notice served by the United States trustee on the debtor, the trustee, and any other entities
4 as the court directs.” Fed. R. Bankr. P. 1017(c). The appellate court held that this rule
5 does not govern a sua sponte dismissal made in accordance with 11 U.S.C. § 105(a).
6 Furthermore, even if Fed. R. Bankr. P. 1017(c) conflicts with 11 U.S.C. § 105(a), the
7 conflict must be resolved in favor of the Code. Tennant, 318 B.R. at 870.

8 The Tennant court also considered the notice, hearing, and due process rights of
9 the debtor in that case, commenting that “[e]ven though the court dismissed Debtor’s case
10 . . . through its general powers under Section 105(a), the concept of procedural due
11 process requires a notice and an opportunity to be heard.” Tennant, 318 B.R. at 870. The
12 appellate court noted that the concept of notice and a hearing is “flexible and depends on
13 what is appropriate in the particular circumstance.” Tennant, 318 B.R. at 870. While
14 dismissal without notice and an opportunity to be heard is not appropriate where
15 substantive issues are to be determined, if a case involves “only very narrow procedural
16 aspects, a court can dismiss a Chapter 13 case without further notice and a hearing if the
17 debtor was provided ‘**with notice of the requirements to be met.**’” Tennant, 318 B.R.
18 at 870 (quoting Meints, 222 B.R. at 872). “Thus, a procedure is ‘perfectly appropriate’ that
19 notifies the debtor of the deficiencies of his petition and dismisses the case sua sponte
20 without further notice and a hearing when the debtor fails to file the required forms within
21 a deadline.” Tennant, 318 B.R. at 870-71 (quoting In re Minkes, 237 B.R. 476, 478 (8th Cir.
22 BAP 1999)). Applying this standard, the Tennant court held that the notice to the debtor
23 was appropriate under the circumstances and an actual hearing was not necessary. The
24 debtor was notified that failure to file the missing documents would lead to a dismissal
25 without further notice and that he must file a motion to receive an extension of time. The
26 failure to file the required documents within 15 days was not substantive. Tennant,
27 318 B.R. at 871.

28 MEMORANDUM DECISION - 6

1 The Debtors argue that Tennant does not apply in their case because the
2 compliance issues stemming from the Trustee's objection to confirmation and alternative
3 motion to dismiss are in fact "substantive issues," rather than procedural issues, that
4 require notice and a hearing. The Tennant case does not define the term "substantive
5 issues." Tennant, 318 B.R. at 870-71. The facts of that case, however, and the cases
6 cited within, are instructive for determining what alleged deficiencies should fall under the
7 category of "very narrow procedural aspects." Tennant, 318 B.R. at 870. For instance, a
8 debtor's failure to file documents required by statute or court rule, and to comply with a
9 court order directing the debtor to file these documents by a date certain, is a "very narrow
10 procedural aspect" that does not require notice and a hearing. Tennant, 318 B.R.
11 at 870-71. It is also apparent that based on Meints, a debtor's failure to file certain
12 documents ordered by the court in a prior bankruptcy as a prerequisite to filing a new
13 bankruptcy case, is a procedural issue not requiring notice and a hearing. Meints, 222 B.R.
14 at 871-72.

15 This Court concludes that the use of the Trustee's objection to confirmation and
16 alternative motion to dismiss is procedural, rather than substantive. Like Tennant and
17 Meints, this case involves a *sua sponte* dismissal in the event the Debtors fail to comply
18 with the terms of a strict compliance order. The only difference in this case is that the
19 Trustee, rather than the clerk of the court, has indicated the information to be provided by
20 the Debtors and the deadline for providing such information. This difference has no
21 bearing, however, because similar to the Tennant case, it is uncontested that the
22 requested information is required to complete the Debtors' bankruptcy.² Even if the
23 Debtors disputed the requested information, they would have the opportunity to raise this
24 issue with the Trustee at the First Meeting, or with the Court at the hearing on the Trustee's
25

26 ²The Debtors concede that "[t]he trustee is entitled to request whatever documents
27 or information she deems reasonable, and debtors are required to comply." Debtors' Mem.
Supp. Resp. at 1:15-17.

28 MEMORANDUM DECISION - 7

1 objection to confirmation. Furthermore, the Court alone approves the deadline before
2 signing the strict compliance order.

3 The Debtors next contend that as in In re Dinova, 212 B.R. 437 (2d Cir. BAP 1997),
4 notice of the Debtors' deficiencies in this case was premature. In Tenant, as a part of its
5 due process analysis, the Ninth Circuit Bankruptcy Appellate Panel considered whether the
6 deficiency notice to the debtor was premature, as in Dinova. Tenant, 318 B.R. at 871
7 (citing Dinova, 212 B.R. at 443-44). In that case, the bankruptcy court sent notice of a
8 deficiency to the debtor before the debtor failed to comply with the required procedure, and
9 then dismissed the case without a hearing. The Second Circuit Bankruptcy Appellate Panel
10 held that this procedure did not comport with procedural due process. The Tenant court
11 distinguished the facts of its case, noting that the debtor committed an initial error of
12 incomplete filing, and then the bankruptcy court issued its Comply Order and dismissed the
13 case when the debtor failed to comply. Unlike Dinova, the Ninth Circuit Bankruptcy
14 Appellate Panel found no premature notice to the debtor. Tenant, 318 B.R. at 871.

15 The facts of this case are similar to Tenant. The Debtors in the instant case had
16 a defect in their bankruptcy filing—failure to provide the two most recent pay stubs—that
17 occurred when they filed their Chapter 13 Plan.³ Thereafter, the Debtors were notified of
18 this defect possibly at the First Meeting, but certainly by the hearing set on the objection
19 to confirmation. Consequently, notification was given after the defect occurred, providing
20 the Debtors the opportunity to contest the filing defect at the hearing. Unlike in Dinova,
21 there was no premature notice of defect. Further, the Trustee's proposed order was filed
22 on February 18, with a March 31 strict compliance date, allowing the Debtors sufficient time
23 to comply or have their case dismissed. At the March 1 hearing, the Debtors did not seek
24 additional time or contest the information sought by the Trustee.

25
26 ³Pursuant to Fed. R. Bankr. P. 3015(b), the debtor may file a Chapter 13 plan with
27 the petition, and if not then, "within 15 days thereafter." Local Rules W.D. Wash. Bankr.
R. 3015-1(f) requires a debtor to file copies of the two most recent pay statements and/or
other verification of income "not later than the date the plan is due."

28 MEMORANDUM DECISION - 8

1 The Debtors next assert that unlike Tenant, the Trustee, rather than the Court, is
2 seeking a dismissal. The Debtors point to the language contained in the Trustee's
3 proposed order to deny confirmation:

4 ORDERED that in the event debtor fails to comply with the foregoing
5 order and timelines, the Trustee's Motion to Dismiss the debtor's Chapter 13
6 case should be granted upon submission of a declaration filed in connection
7 with an order of dismissal, without further notice[.]

8 Trustee's Proposed Order at 1:18-20. The Trustee clarifies that what it seeks from the
9 Court is dismissal of a case upon an ex parte statement, made under penalty of perjury,
10 that the debtor failed to comply with the Court's order. The Trustee argues that this
11 process is routinely employed in the entry of orders dismissing a case or granting relief
12 from the automatic stay. In such cases, it is the court, and not the declarant, that dismisses
13 the case or grants the requested relief. These orders are commonly referred to as "strict
14 compliance" orders. Although the Debtors' argument that allowing the Trustee to determine
15 when a debtor has complied with a court order is tantamount to allowing the Trustee to
16 dismiss the case, this argument is not persuasive.

17 In the procedure proposed by the Trustee, the Court must sign and enter the
18 underlying order, or strict compliance order, that directs a debtor to provide certain
19 information to the Trustee by a specific date. Although it is the Trustee who requests the
20 compliance order, only the Court can order it, and only after the debtor has had an
21 opportunity to contest the information requested by the Trustee. Thereafter, as illustrated
22 in Tenant, it is not necessary for a bankruptcy judge to make the determination of whether
23 a debtor has met the procedural requirements of a compliance order, or even sign the
24 dismissal order. In that case, the court clerk first determined that the debtor had not
25 complied with the court's order and then issued a dismissal order. In this case, the Trustee
26 merely proposes that it initially determine whether compliance with the Court's order has
27 been met. Thereafter, the Trustee requests the Court to sign the dismissal order. This is
28 far more judicial involvement than required by the Ninth Circuit Bankruptcy Appellate Panel

MEMORANDUM DECISION - 9

1 in Tenant. This procedure does not usurp the Court's authority. The Debtors have failed
2 to provide any case law or legislation that prohibits the use of similar strict compliance
3 orders.

4 The Debtors' final argument is that the procedure proposed by the Trustee provides
5 no adequate remedy if a case is dismissed improperly. The Trustee counters that the
6 Debtors can seek relief under Fed. R. Bankr. P. 9024. To warrant relief under this rule, the
7 Debtors would be required to establish only their compliance with the Court's order. This
8 is the identical burden that would be on the Debtors if the Trustee filed a motion to dismiss
9 for failure to comply with the Court's order. In that situation, if the Trustee presented
10 evidence that the Debtors had not complied with the Court's order, the Debtors would then
11 be required to establish compliance. The Court agrees that there is no meaningful
12 difference between the burden of proof placed on the Debtors for purposes of seeking a
13 Fed. R. Bankr. P. 9024(b)(1) motion and defending a motion to dismiss. Fed. R. Bankr. P.
14 9024 provides an adequate remedy for a debtor whose Chapter 13 case is dismissed
15 improperly.

16 The Court concludes that the Trustee, or a creditor, may utilize a strict compliance
17 order that allows the Court's sua sponte dismissal of a Chapter 13 case without further
18 notice, in accordance with 11 U.S.C. § 105(a). Although fully supported by the Tenant
19 case, the Court's result is also in accord with the plain language of 11 U.S.C. § 105(a).
20 Section 105(a) explicitly grants a court the authority to "issue any order" that is necessary
21 to "carry out the provisions of this title," or to take "any action or mak[e] any determination
22 necessary or appropriate to enforce or implement court orders or rules, or to prevent an
23 abuse of process." The Code and court rules, both federal and local, require that a debtor
24 provide specific financial information in order to confirm a Chapter 13 plan and enjoy the
25 privileges of bankruptcy protection. As part of the confirmation process, the Trustee
26 routinely reviews a debtor's Chapter 13 plan to determine whether it complies with the
27 requirements of the Code and the bankruptcy rules, including whether the debtor has filed
28

MEMORANDUM DECISION - 10

1 information adequate for confirmation. The plain language of 11 U.S.C. § 105(a) grants the
2 Court the authority to order a debtor to provide that information required by the Code and
3 bankruptcy rules for confirmation. Furthermore, 11 U.S.C. § 105(a) grants the Court the
4 authority to take any action necessary or appropriate to enforce its order. Accordingly, if
5 a debtor fails to comply with the Court's strict compliance order that directs the debtor to
6 provide information required of it by the Code and rules, 11 U.S.C. § 105(a) allows the
7 Court to dismiss the debtor's case.

8 The interest of efficiency also supports the use of strict compliance orders. Due to
9 the shear volume of filed Chapter 13 cases, the Trustee must have a procedure that will
10 allow it to move cases quickly to confirmation in the most efficient and practicable manner
11 possible. The methods previously used by the Trustee illustrate that the Trustee is seeking
12 to balance efficiency and fairness to both debtors and creditors in each case. As conceded
13 by the Debtors, the information requested by the Trustee is not only reasonable, but it is
14 required by the Code and bankruptcy rules for plan confirmation. If a debtor has the
15 opportunity to contest the information requested by the Trustee and is afforded a
16 reasonable amount of time to provide the information or seek an extension, there appears
17 to be no reason to allow the debtor to stretch out the confirmation process, at the creditors'
18 expense, by requiring the Trustee to file a separate motion to dismiss pursuant to 11 U.S.C.
19 § 1307. Because a debtor is seeking the benefits of bankruptcy and the automatic stay,
20 it is not overly burdensome to require the debtor and/or debtor's counsel to comply with the
21 Code and bankruptcy rules in a timely manner.

22 While concluding that strict compliance orders are permitted, the Court cautions that
23 such orders are enforceable only to the extent they comport with the due process
24 requirements identified in Tenant. To ensure due process is provided, the following
25 criteria must be met before this Court will approve a strict compliance order that includes
26 a penalty of dismissal for failure to comply:

27
28 MEMORANDUM DECISION - 11

(1) Contained within an objection to confirmation, the Movant shall request that in the event the Court sustains the objection, the Court enter an "order for strict compliance or dismissal." This request should also be noted in the pleading caption.

(2) The objection to confirmation and request for strict compliance order shall contain the following:

- a. the debtor's filing defects and/or additional information sought by the Movant;
- b. refer to the Code, rule, or case law that requires the information requested;
- c. provide that if the debtor disputes the defects identified in the objection to confirmation or the additional information requested by the Movant, or requests additional time to comply, the debtor must file a written objection to be set at the same time as the hearing on the Movant's objection to confirmation and request for strict compliance order;
- d. propose a deadline that gives the debtor a reasonable amount of time to comply with the strict compliance order (whether an amount of time is reasonable will depend on the type and quantity of the information requested);
- e. provide that without further notice to the debtor, a dismissal order shall be entered by the Court upon the filing of the Movant's declaration, stating that the debtor has not provided the information required by the strict compliance order within the specified time, and that the debtor did not seek or obtain an extension of time to comply with the strict compliance order.

(3) The Movant's declaration in support of the order of dismissal must set forth what information the Court ordered the debtor to provide, the deadline date to provide the information, that the debtor did not seek or obtain an extension of time to comply with the strict compliance order, and what information the debtor failed to provide by the deadline date.

Accordingly, the Trustee's objection to confirmation is sustained. Within 15 days of the entry of this Memorandum Decision and the attendant order, the Trustee must file a strict compliance order consistent with this Memorandum Decision for Court approval. Because the Trustee previously allowed the Debtors 30 days to provide the requested information, the strict compliance order will allow the Debtors 30 days from the date the order is entered to provide the requested information. The Court notes that the criteria established in this Memorandum Decision for enforceable strict compliance orders are

MEMORANDUM DECISION - 12

1 prospective only and, consequently, does not affect any strict compliance orders previously
2 entered by this Court.

3 DATED: April 26, 2005

4 
5 Paul B. Snyder
U.S. Bankruptcy Judge

28 MEMORANDUM DECISION - 13